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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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DEANA WILLIAMSON
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No. PD-0715-17

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
7/5/2018
DEANA WILLIAMSON, CLERK

JOSEPH SMITH,
Appellant

v.

THE STATE OF TEXAS,
Appellee

APPELLANT'S REPLY

On Grant of Appellant's Petition For Discretionary Review
from the Fourteenth Court of Appeals Cause No. 14-15-00502-CR,
affirming the judgment in Cause No. 1336966
from the 228th District Court, Harris County, Texas.

ALEXANDER BUNIN
Chief Public Defender
Harris County, Texas

SARAH V. WOOD
Assistant Public Defender
Harris County, Texas
Texas Bar Number 24048898
1301 Franklin, Suite 100
Houston, Texas 77002
Phone: (713) 368-0016
Fax: (713) 368-9278
Sarah.Wood@pdo.hctx.net

Counsel for Appellant

The Voluntary Intoxication Instruction was Error

It is plainly error to include a "voluntary intoxication" charge at punishment. "Error" occurs when any of the various statutory provisions referenced in Article 36.19 "has been disregarded." *Posey v. State*, 966 S.W.2d 57, 60 (Tex. Crim. App. 1998). One of those statutory provisions is Article 36.14 which requires that the charge "distinctly set forth the law applicable to the case."

A "voluntary intoxication" charge is not the law applicable to a punishment case. *Taylor v. State*, 885 S.W.2d 154, 156 n. 4 (Tex. Crim. App. 1994); *Sakil v. State*, 287 S.W.3d 23, 26 n. 6 (Tex. Crim. App. 2009) (reaffirming that "[s]ubsection (a) is directed to the guilt phase of trial.") *Kresse v. State*, 2-09-271-CR, 2010 WL 1633383, at *2 (Tex. App.—Fort Worth Apr. 22, 2010, no pet.)(mem. op., not designated for publication) (State conceding error where "voluntary intoxication" was given at punishment).

The State argues that the lead plurality opinion employs the correct analysis by focusing only on whether the charge caused jury confusion. As primary support, the State quotes from *Williams v. State*, 547 S.W.2d 18, 20 (Tex. Crim. App. 1977). However, *Williams'* oft-quoted language actually states, "It is **not** the function of the charge **merely** to avoid misleading or confusing the jury: it is the function of the charge to lead and to prevent confusion."

That is, it's not enough to merely avoid causing confusion. To not amount to error, the charge must actively prevent confusion. The next line in *Williams* reads, "A

charge that does not apply the law to the facts fails to lead the jury to the threshold of its duty: to decide those fact issues."

Even under the State's showcase quotation, a misplaced instruction as in this case still must be found erroneous. The court of appeals said it was not error because it "did no work." But to be correct, a charge must do work—it must actively "**lead** the jury to the threshold of its duty" to apply the law to the facts. A misplaced instruction cannot work and does not properly lead. It is error.

This Court should set forth an accurate method of analysis by applying the relevant statutes dictating the trial court erred in this case. To hold otherwise would permit a voluntary intoxication charge at punishment in nearly any case involving drug or alcohol use.

The Voluntary Intoxication Instruction was Harmful

The standard in this case of "some harm" is considered a "low threshold" and the appellant is not required to actually demonstrate harm. *Navarro v. State*, 469 S.W.3d 687, 700 (Tex. App.— Houston [14th Dist.] 2015), pet. ref'd. "[T]he presence of any harm, regardless of degree, which results from preserved charging error, is sufficient to require a reversal of the conviction. Cases involving preserved charging error will be affirmed only if no harm has occurred." *Arline v. State*, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986). It is impossible to say that harm did not occur in this case since the erroneous instruction went to the very cornerstone of the sole defense.

The State failed to discuss in any detail whether a plain reading of the misplaced instruction would lead a reasonable juror to disregard intoxication as mitigation. As stated in *Baer v. Neal*, "It is unreasonable to assume jurors could catch the nuance that voluntary intoxication can be considered for mitigation, but not as evidence of criminal intent, without any clear instruction." 879 F.3d 769, 779 (7th Cir. 2018) (case on point, reversing for use of a voluntary intoxication charge at punishment). It is notable that even the State in its brief uses the words "defense" and "mitigation" interchangeably. (See State's Reply at 15, 23, 27). The prosecutor in closing argument told the jury that the intoxication evidence was not mitigation because it was voluntary. (7 R.R. at 201).

The State only argues that the instruction to "consider all the evidence" somehow cures any confusion arising from "voluntary intoxication is not a defense." If the two instructions were applied together as the State suggests, a rational juror would be led to consider intoxication not as a defense, but as an "anti-defense," thereby increasing the defendant's culpability and focusing solely on the criminal aspects of drug use to increase his sentence. If anything, the instruction to consider all the evidence would require the jurors to consider all the evidence as an aggravating factor against the defendant and exacerbate the harm.

The appellant in this case had a right to have the jury consider his mitigation evidence. This is a right that substantially affects the punishment imposed. The appellant had a substantial and legitimate expectation that he would be deprived of his

liberty only to the extent determined by the jury in the exercise of its statutory discretion and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the state. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).

It is impossible to determine what sentence the jury would have given if its discretion to consider the mitigating evidence had not been harnessed. As the Supreme Court observed under similar circumstances, it can be a "frail conjecture that a jury might have imposed a sentence equally as harsh [in the absence of error]." *Hicks,* at 346.

The deliberative process by which a jury decides punishment (in which it weighs mitigating and aggravating factors against one another) is a complex process. "Deciding what punishment to assess is a normative process, not intrinsically fact-based." *Sunbury v. State*, 88 S.W.3d 229, 233 (Tex. Crim. App. 2002). Because it is a "normative process," it is not exclusively a function of rule and logice, but instead depends in large part upon the psychological makeup of the individual jurors. "[E]ach juror must necessarily rely upon his own feelings, emotions, and experiences because there is no other criterion by which he or she can evaluate the facts. The genius of the jury system, however, is that the individual perspectives of twelve jurors are blended into one punishment verdict." *Torres v. State*, 92 S.W.3d 911, 922 (Tex. App. – Houston [14th Dist.] 2002).

Jurors' experience of the world will inevitably differ, and this is what makes a sentencing trial so unpredictable. Reviewing courts should avoid sitting as a 13th juror when attempting to re-weigh the evidence as if the error had not occurred. Drug

addiction is a valid basis for mitigation and it is impossible to say the jury would not have assessed a sentence of less than life if they had been properly instructed.

PRAYER

FOR THESE REASONS, the Appellant respectfully prays that this Honorable Court reverse the judgment and remand for a new hearing on punishment.

Respectfully submitted,

ALEXANDER BUNIN
Chief Public Defender
Harris County Texas

/s/ Sarah V. Wood
SARAH V. WOOD
Assistant Public Defender
Harris County Texas
1301 Franklin, Suite 100
Houston Texas 77002
(713) 368-0016 (phone)
(713) 368-9278 (fax)
State Bar Number 24048898
Sarah.Wood@pdo.hctx.net

CERTIFICATE OF SERVICE AND COMPLIANCE

This is to certify that this filing has 1,091 words and that a copy of the foregoing reply to the State's brief on discretionary review has been served on the District Attorney of Harris County, Texas, by the efile service and to the State Prosecuting Attorney.

/s/ Sarah V. Wood
SARAH V. WOOD